

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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Implementation of Section 25 of the Cable  
Television Consumer Protection and Competition  
Act of 1992, Direct Broadcast Satellite Public  
Service Obligations

MM Docket No. 93-25

COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

EchoStar Communications Corporation ("EchoStar") hereby submits these comments in response to the above-captioned Notice of Proposed Rulemaking, where the Commission seeks to define the public service obligations of Direct Broadcast Satellite ("DBS") providers pursuant to the mandate of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act").<sup>1/</sup> Among other things, Section 25 of that Act, 47 U.S.C. § 335, directs the Commission to require that each DBS provider reserve 4 to 7% of its channel capacity exclusively for noncommercial programming of an educational or informational nature. EchoStar, through its subsidiaries, provides DBS service by two satellites operating from the 119° W.L. orbital location. EchoStar also has authorizations for DBS satellites to operate from the 61.5° W.L., 148° W.L. and 175° W.L. orbital locations.

<sup>1/</sup> See Public Notice, FCC 97-24 (rel. Jan. 31, 1997), inviting comments to refresh the record in Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Service Obligations, Notice of Proposed Rulemaking, 8 FCC Rcd. 1589 (1993) ("NPRM").

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EchoStar applauds the efforts of Congress and the Commission to ensure the availability of public service programming to DBS subscribers. In implementing the Congressional directive, the Commission should be mindful to encourage voluntary public service initiatives by DBS providers. EchoStar will soon announce a ground-breaking plan that will involve dedicating DBS capacity to offerings of high-quality educational and public service programming on an unprecedented scale. This plan will be possible thanks to the substantial additional capacity and resources to be made available to EchoStar through its alliance with The News Corporation Limited ("News Corp."), for which EchoStar hopes that the parties will be requesting Commission approval. EchoStar respectfully submits that the Commission's public service rules should be flexible enough to accommodate such initiatives.

EchoStar also offers its views on certain specific proposals contained in the NPRM. With respect to the principle of localism, EchoStar agrees with the Commission that no additional regulation of DBS providers is warranted. The public service obligations imposed on DBS providers should not be affected by any technological developments in the area of local signal retransmission through spot beam technology. EchoStar's plan to offer local signals to make EchoStar a more effective competitor against dominant cable operators in the MVPD marketplace must not be used as a basis for imposing additional regulation on entrepreneurial DBS companies. Furthermore, in light of the administrative difficulties of pre-determining the per channel costs of each DBS provider, the Commission should regard computation of the discounts and reasonable rates contemplated by the statute as a last resort. In the first instance, the Commission should rely upon good faith negotiations between DBS providers and national

educational programming suppliers.

**I. ECHOSTAR WILL SOON ANNOUNCE A GROUND-BREAKING PUBLIC SERVICE INITIATIVE**

Ever since EchoStar started planning its DBS service offerings, its business plan has prominently included educational and other public service programming. EchoStar has viewed the focus on education as one of the important attributes that would positively distinguish EchoStar from other MVPD providers. EchoStar, unlike many other MVPD providers, believes that, in achieving a distinctive edge for its product offerings, the emphasis on so-called "non-commercial" programming makes commercial sense.

EchoStar's educational and public service plans have received a major boost as a result of the recently concluded transaction between EchoStar and News Corp., for which EchoStar hopes that the parties will soon request Commission approval. If approved by the Commission, that agreement will allow EchoStar to integrate valuable additional DBS capacity into its existing service. This additional capacity will enable EchoStar to put together a hitherto unprecedented educational offering -- several channels dedicated to educational and public service programming that will exceed the set-aside mandated by the Cable Act.

This enhanced program offering would not be possible without the News Corp. transaction: EchoStar is among the few entrepreneurial companies that have managed to make a credible entry into the MVPD market. Despite this accomplishment, EchoStar risks being, at best, a marginal presence in the MVPD market absent a substantial infusion of DBS capacity, satellites and capital. Without those additional resources, EchoStar will need all of its full-CONUS and half-CONUS capacity to counter the mainstream programming packages offered

by cable operators, DirectTV and PRIMESTAR. Even if EchoStar could compete at all, it would be questionable if it could carve out sufficient capacity for as robust an educational offering as it would like. Accordingly, EchoStar might have to settle for a capacity set-aside that no more than complied with the statutory requirement. Even such a set-aside could have threatened EchoStar's competitive viability.

EchoStar is in the process of finalizing its public service plans in light of its recently announced alliance with News Corp. Indeed, EchoStar achieved a substantial stride in the process in March, when its Vice Chairman, Mr. Scott Zimmer, organized an educational symposium in Sarasota, Florida, devoted to a highly productive exchange of ideas with independent content providers and other members of the educational community. At that symposium, EchoStar was able to solicit valuable inputs from experts in the areas of public broadcasting, distance learning, cable-in-the-classroom, virtual university establishment, early childhood education and psychology and electronic publishing, as well as representatives of state educational consortia.

EchoStar anticipates that it will be ready to announce the details of its educational and public service plan in the near future. EchoStar submits that any such voluntary initiatives should count towards the DBS public service obligations that Congress has directed the Commission to impose. At the same time, EchoStar welcomes the Commission's effort to give shape to this Congressional directive, and offers the following comments on certain discrete

aspects of the Commission's proposals.<sup>2/</sup>

## **II. THE INTRODUCTION OF LOCAL BROADCAST SIGNALS BY DBS PROVIDERS SHOULD NOT GIVE RISE TO ADDITIONAL REGULATION**

Section 25(a) of the Cable Act asks the Commission to consider "the opportunities that the establishment of DBS service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service." 47 U.S.C. § 335(a)(1). In connection with this provision, the NPRM asks "whether it is technically possible and economically feasible to provide local DBS service," and inquires about the implications of technological change. The NPRM expresses the tentative view that, "if local DBS service is not technically and economically feasible, other regulations should not be considered in this area given that DBS is a fledgling industry and that there is an abundance of local broadcast stations and cable television systems that already service local needs." NPRM ¶ 36.

EchoStar strongly believes that any intervening technological progress regarding the provision of local signals over DBS should not change at all the Commission's sound view that additional DBS regulation is not warranted. EchoStar, like its partner News Corp., has a strong voluntary commitment to providing local service, eventually through use of spot beam technology. This commitment is dictated not by regulatory fiat, but rather by the marketplace.

EchoStar believes that the lack of local signal retransmission is perhaps the most significant shortcoming of current DBS offerings compared to the programming packages of

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<sup>2/</sup> Also, EchoStar has reviewed the comments filed today by News Corp.'s affiliate American Sky Broadcasting, LLC ("ASkyB") and endorses ASkyB's views on the appropriate scope and content of these obligations.

dominant cable operators. The expected addition of local signals to EchoStar's DBS offering will likely level the playing field and allow EchoStar to become a more effective competitor in the MVPD market. It would be counterproductive if this plan, by which EchoStar hopes to further the Commission's long-sought goal of effective competition against the MVPD incumbents, resulted in additional regulation of the challengers. Section 25 of the Cable Act pointedly refrains from imposing such regulation on DBS providers. With foresight, Congress recommends reliance on technological change as the Commission's first option to satisfy the principle of localism. Indeed, the retransmission of local signals itself serves localism by expanding the audience of indigenous broadcast offerings. The Commission should embrace this technological development, not penalize it. Any new regulation imposed on EchoStar by virtue of its local retransmission plan would decrease its ability and economic incentive to compete head-to-head against cable operators and thereby damage, instead of furthering, the principle of localism.

### **III. THE COMMISSION SHOULD REGARD THE LIMITED RATE REASONABLENESS INQUIRY AND DISCOUNT CALCULATION AUTHORIZED BY THE CABLE ACT AS A LAST RESORT**

One of the ways contemplated by the statute for satisfying the educational set-aside obligation is to make channel capacity available to "national educational programming suppliers upon reasonable prices, terms and conditions."<sup>3/</sup> These prices may not exceed 50 percent of the "total direct costs" of making a DBS channel available, excluding marketing costs,

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<sup>3/</sup> 47 U.S.C. § 335(b)(1). With respect to the meaning of "national educational programming suppliers," EchoStar agrees with the suggestion of the NPRM that the statutory definitions of similar terms in Part IV of Title III of the Act, as well as the Commission's eligibility criteria for ITFS licensees, provide relevant guidance. The Commission should not go beyond those concepts in defining the term.

general administrative costs, and similar overhead costs. 47 U.S.C. § 335(b)(4). EchoStar agrees with the Commission that such costs should include a proportional share of satellite construction, launch and insurance expense, as well as the costs of uplink facilities and of the tracking, telemetry and control functions. NPRM at ¶ 50. Auction payments made by DBS permittees such as EchoStar to acquire a permit at a DBS auction, as well as the cost of acquiring control of a DBS permit or license in a private transaction, should also clearly be cognizable cost items. DBS providers incur large front-loaded costs to enter the market. These costs must be included in calculating the starting point for the 50% discount contemplated by the statute for national educational programming suppliers. EchoStar also agrees with the NPRM that the allowable costs should include certain "overhead or personnel costs" associated with resources devoted to the distribution of educational programming.

The cost allocation formula for joint and common costs can be simple. The Commission should use the same methodology for allocating costs to a DBS channel as for deriving the portion of a DBS provider's capacity that should be set aside. It should allocate in the same manner the auction or private acquisition costs, costs of satellite construction, launch, insurance and operation, costs of the uplink facility, including network management costs, costs of digitization, compression and conditional access, and TT&C expenses. All of these costs should be easily ascertainable. The Commission should add the "back-haul" cost of transporting this extra programming to the DBS uplink center, and the proportional cost of any personnel and resources devoted solely to the provision of educational programming.

Procedurally, it is essential that the Commission regard this reasonableness inquiry as a last resort, especially in light of the administrative difficulty of pre-determining the costs of

each DBS provider. In the first instance, the Commission should rely on the parties to negotiate in good faith and arrive at mutually satisfactory terms. The Commission must refrain from calculating rates until after the parties have failed to reach agreement and either party resorts to the Commission. This approach is consistent with the long-standing rule and practice in virtually all areas of federal rate regulation. Even in common carrier industries characterized by heavily regulated tariff rates, the carrier has the ratemaking initiative. The agency generally may not intervene with a reasonableness investigation before the rate is set. The Commission should avoid transcending that practice and attempting to set rates beforehand in the lightly regulated, non-common carrier DBS industry.<sup>4/</sup>

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<sup>4/</sup> This approach is also consistent with microwave relocation rule in the PCS area. See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8825 (1996); Second Report and Order, WT Docket No. 95-157 (rel. Feb. 27, 1997).



#### IV. CONCLUSION

Subject to the recommendations made above, the Commission's public service proposals have the potential to advance the cause of education and wide dissemination of public service programming. EchoStar, an entrepreneurial DBS provider with a long-standing dedication to educational and public service programming, welcomes the challenge, and will soon present to the Commission its own initiative in this area.

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of April, 1997, I caused copies of the foregoing pleading to be served by hand delivery to the following:

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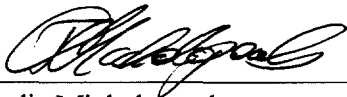
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